Filed 11/3/10 P. v. Crowder CA4/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL RAY CROWDER, JR., Defendant and Appellant.	E049990 (Super.Ct.Nos. RIF127031 & RIF151797) OPINION

APPEAL from the Superior Court of Riverside County. Harold W. Hopp, Judge. Affirmed.

Stephen S. Buckley, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Lynne McGinnis and Marilyn L. George, Deputy Attorneys General, for Plaintiff and Respondent.

On May 19, 2006, defendant and appellant Michael Ray Crowder, Jr., pled guilty to one count of robbery (Pen. Code, § 211)[1] and was placed on three years' probation in case No. RIF127031. On October 22, 2009, an amended information was filed (case No. RIF151797) charging defendant with robbery. (§ 211.) Defendant's prior robbery conviction (case No. RIF127031) was alleged as both a serious prior offense (§ 667, subd. (a)), as well as a prior strike conviction (§§ 667, subds. (c), (e)(1), 1170.12, subd. (c)(1)). On November 2, 2009, a jury found defendant guilty of robbery in case No. RIF151797. (§ 211.) On December 18, 2009, the trial court found both prior conviction allegations true in case No. RIF151797. (§§ 667, subds. (c), (e)(1), 1170.12, subd. (c)(1).) The trial court sentenced defendant to a total of nine years in state prison in case No. RIF151797. The trial court also found that defendant had violated his probation in case No. RIF127031. The trial court revoked defendant's probation. He was sentenced to two years in state prison, to be served concurrently with his sentence in case No. RIF151797. Defendant filed a notice of appeal in both cases.

On appeal, defendant contends the trial court erred in: 1) denying his request to instruct the jury on grand theft as a lesser included offense of robbery; and 2) denying his *Romero*[2] motion. We affirm.

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

[2] *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497 (*Romero*).

FACTUAL BACKGROUND

On the evening of December 10, 2006, the victim went to see a movie with her brother at University Village. After the movie, they started walking toward Starbucks, when the victim felt something pulling and tugging on the straps of her purse. She did not realize what was happening. The "pulling back and forth" and tugging occurred a few times. The victim turned around to see what was going on. A man (later identified as defendant) was tugging on her purse. He pulled the purse away from her, and she let go. The victim was afraid and did not want to give defendant her purse. Defendant ran away with the purse, but was soon tackled by two security guards. They wrestled defendant to the ground, handcuffed him, and called the police.

I. The Trial Court Properly Refused to Instruct the Jury on Grand Theft As a Lesser Included Offense of Robbery

Defendant argues that the trial court erred when it refused his request to instruct the jury on grand theft from the person as a lesser included offense to robbery, the crime charged. We disagree.

A. *Standard of Review*

"A trial court must instruct on a lesser included offense if substantial evidence exists indicating that the defendant is guilty only of the lesser offense. [Citation.]" (*People v. Manriquez* (2005) 37 Cal.4th 547, 584 (*Manriquez*).) On appeal, "we employ a de novo standard of review and independently determine whether an instruction on the lesser included offense . . . should have been given." (*Ibid*.)

B. *Relevant Background*

During a break in the People's case, the parties discussed jury instructions, and defense counsel requested an instruction on attempted robbery and on the lesser included offense "because the jury has to make a determination on the force or fear element." The trial court remarked, "So far I have not heard any evidence that suggests there was not force or fear." Defense counsel confirmed that the witnesses had testified that there was a struggle, that the victim was trying to hold on to her purse, and that "force was being used to take it away." The prosecutor seemed to agree that the instruction on the lesser included offense should be given. The trial court stated that it would not give a lesser instruction unless there was evidence that would support the verdict. However, it reiterated that, so far it had not heard any evidence that "would support a finding that there wasn't force or fear." The trial court stated that it would not give the instruction "just because it's technically a lesser-included offense if there is no evidence that would support that verdict." The trial court added that after it heard the rest of the testimony, it would give a theft instruction if there was evidence that would support a verdict of theft as opposed to robbery.

After both sides rested, defense counsel again requested a jury instruction on grand theft as a lesser included offense. The trial court asked defense counsel to identify the evidence he believed would support a verdict of theft. Defense counsel stated: "The description of the taking of the purse that was described by [a bystander witness] was that there was contact with the purse made by the man. The woman, when she felt contact, turned and moved backward and made a clutching with her arm. Then the purse was just

simply taken off." Defense counsel also referred to defendant's testimony that he was intoxicated at the time. The trial court concluded, "In listening to all of the witnesses including [the bystander witness] and [defendant], there is not significant evidence or substantial evidence that would support a verdict of grand theft; therefore, I am not giving that as a lesser-included offense."

C. *There Was No Substantial Evidence to Support the Instruction*

"Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." (§ 211.) "Theft in any degree is a lesser included offense to robbery, since all of its elements are included in robbery. The difference is that robbery includes the added element of force or fear. [Citation.]" (*People v. Burns* (2009) 172 Cal.App.4th 1251, 1256 (*Burns*).) In *People v. Morales* (1975) 49 Cal.App.3d 134 [Fourth Dist., Div. Two], this court observed that no case had purported to precisely define that amount of force. (*Id*. at p. 139.) "'[W]hen actual force is present in a robbery, at the very least it must be a quantum more than that which is needed merely to take the property from the person of the victim, and is a question of fact to be resolved by the jury taking into account the physical characteristics of the robber and the victim.' [Citation.] An accepted articulation of the rule is that '"[a]ll the force that is required to make the offense a robbery is such force as is actually sufficient to overcome the victim's resistance . . . ."' [Citations.]" (*Burns*, at p. 1259.)

In this case, defendant came up to the victim, and grabbed her purse as she tried to hold onto it. The evidence established that there was a "tug-of-war" for the purse. At

trial, the victim testified that there was "a pulling back and forth" a few times and that the perpetrator pulled "forcefully." One of the security guards testified that he saw two people "struggling for a purse." He said he observed a man and a young woman "kind of holding the straps and [they were] almost in . . . a tug-of-war, pulling it." The security guard agreed that it was fair to describe the struggle as "significant." A witness testified at trial that, on December 10, 2006, she was walking toward Starbucks at University Village, when she saw a man approach a girl, grab her purse, "tussled" with her, and run away. The witness said that the girl was hanging on to the purse, and that the man grabbed it and took it away from her. The witness also testified that the girl was "really scared" during the struggle, and that she was crying afterward.

Defendant testified on his own behalf at trial and admitted that he grabbed the victim's purse, but could not get it away from her. Defendant's strength apparently overcame the victim's resistance, and he eventually got away with her purse. (See *Burns*, *supra*, 172 Cal.App.4th at p. 1259.) All of the witnesses' testimonies were consistent that there was a struggle between defendant and the victim. "[W]here a person wrests away personal property from another person, who resists the effort to do so, the crime is robbery, not merely theft." (*Burns*, at p. 1257.) The offense here was robbery, and there was no basis for a jury to find that the offense was grand theft.

Defendant argues that the trial court "errantly adopted a presumption against giving the lesser included grand theft instructions and improperly imposed upon [him] the duty to prove his right to them." We disagree. The trial court expressly stated that it had listened to all of the witnesses testify before deciding not to instruct the jury on grand

theft. The trial court was only required to instruct on the lesser included offense "if substantial evidence exists indicating that the defendant is guilty only of the lesser offense. [Citation.]" (*Manriquez*, *supra*, 37 Cal.4th at p. 584.) It properly concluded that there was no substantial evidence to support a verdict of grand theft, since there was ample evidence that force was used in the taking of the purse. We note that when the trial court asked defense counsel to identify the evidence that would support a verdict of theft, rather than robbery, defense counsel cited the witness's testimony that "there was contact with the purse made by the man" and when the victim felt contact, she "turned and moved backward and made a clutching with her arm." Defense counsel stated that "[t]hen the purse was just simply taken off." Defense counsel's argument misstated the evidence. Even on appeal, defendant claims that "clearly there was sufficient credible evidence presented to justify having the jury consider the asserted defense theory of grand theft," but he fails to point to any evidence to support a verdict on the lesser offense. He points out that the victim and other witnesses "described no physical contact between [him] and the victim," and that he remembered "only touching the purse." However, "'the force by means of which robbery may be committed is either actual or constructive.'" (*People v. Wright* (1996) 52 Cal.App.4th 203, 210-211.) Thus, defendant did not have to actually touch the victim for it to be a robbery.

Defendant further claims that the evidence presented showed that he had been drinking, he "approached the victim from behind, pulled quickly on her purse, and it was released *after an initial pull back*." (Italics added.) Defendant misstates the evidence.

As described above, the evidence showed that there was more than just one tug and, in fact, the victim tugged back "a few times."

There was evidence that the requisite element of force was present. Thus, there was no substantial evidence indicating that defendant was guilty only of the lesser offense, and the trial court had no duty to instruct on grand theft as a lesser included offense of robbery.

II. The Trial Court Properly Denied Defendant's *Romero* Motion

Defendant argues that the trial court abused its discretion in denying his *Romero* motion to dismiss his prior strike conviction. He asserts that the trial court failed to assess all the facts that placed him outside the spirit of the three strikes law, such as the specific nature of this offense or his criminal history. He also asserts that he committed two nonviolent acts of purse snatching, that he was not a career criminal, and that he was intoxicated at the time of the instant offense. He explains that he had "a serious and sustained drug and alcohol condition that led him to this ill advised course of action." He concludes that the trial court improperly focused on his "single prior purse snatching offense and the need to take him 'out of circulation.'" We conclude that the trial court properly declined to strike his prior strike conviction.

A. *Standard of Review*

In *Romero*, the California Supreme Court held that a trial court has discretion to dismiss a three-strike-prior-felony conviction allegation under section 1385. (*Romero*, at pp. 529-530.) "[A] trial court's refusal or failure to dismiss or strike a prior conviction allegation under section 1385 is subject to review for abuse of discretion." (*People v.*

Carmony (2004) 33 Cal.4th 367, 375 (*Carmony*).) "[A] trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it." (*Id*. at p. 377.) "'"[T]he burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review."' [Citations.]" (*Id*. at pp. 376-377.)

The three strikes law "establishes a sentencing norm, [and] it carefully circumscribes the trial court's power to depart from this norm and requires the [trial] court to explicitly justify its decision to do so. . . . [¶] In light of this presumption, a trial court will only abuse its discretion in failing to strike a prior felony conviction allegation in limited circumstances. For example, an abuse of discretion occurs where the trial court was not 'aware of its discretion' to dismiss [citation], or where the [trial] court considered impermissible factors in declining to dismiss [citation]." (*Carmony*, *supra*, 33 Cal.4th at p. 378.)

B. *The Trial Court Did Not Abuse Its Discretion*

The touchstone of the *Romero* analysis is "'whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies.' [Citation.]" (*Carmony*, *supra*, 33 Cal.4th at p. 377.)

Here, the trial court was clearly aware of its discretion to dismiss a strike, and it considered permissible factors in declining to dismiss. The trial court considered the written motion and heard the testimonies of defendant's aunt and mother, a family friend, and defendant himself, regarding his background, character, and future prospects. The trial court also read and considered the probation report. It expressly stated that it had considered that defendant committed two robberies; and, for the first one, he spent a small amount of time in custody; and, for the current offense, he would spend a much more significant amount of time in custody. It stated: "The three strikes law was designed for people who don't learn the first time and need to be kept out of circulation as a result." The trial court then denied the *Romero* motion. We see no abuse of discretion.

Defendant's prior strike conviction for robbery involved circumstances similar to those of the current robbery. In the first robbery, he approached a 68-year-old woman, asked her for spare change, and then grabbed her purse and wrestled it away from her. He was convicted of the first robbery and given leniency by being placed on probation. Nonetheless, he committed the current robbery less than four months after receiving probation. He failed to accept any responsibility for the current offense. He told the trial court that it was not his "regular self" who had approached the victim, since he was allegedly under the influence of alcohol and marijuana at the time. He said that the "regular [him]" would not have committed the robbery, and he asked the trial court for mercy. However, in light of the fact that he had committed a similar purse snatching and had been placed on probation only a few months prior, his plea for mercy was empty.

Moreover, defendant had two previous misdemeanor convictions in 2003—one for resisting a police officer (§ 69) and one just a few months later for criminal threats (§ 422). He was placed on probation for both of these offenses. Defendant has shown his disregard for the law, and his current offense demonstrates that past attempts of placing him on probation have failed to rehabilitate him.

On this record, we cannot say that the trial court's decision not to strike defendant's prior conviction was either irrational or arbitrary. Thus, it did not constitute an abuse of its discretion.

DISPOSITION

The judgment is affirmed

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HOLLENHORST
J.

We concur:

RAMIREZ
P. J.

McKINSTER
J.